fendant the Court had no right to consider ecclesiastical matters and dismissed the suit, 279 App. Div. 1015 (1952).

A motion was made before the Appellate Division to resettle order. This motion was denied but on the Court's own motion, its decision was amended by adding thereto the following:

> "Findings of fact, express and implied, inconsistent with the foregoing, except such findings as were made expressly or by implication, upon questions of doctrine, polity and other ecclesiastical matters, are reversed. For the reasons heretofore stated, this court has not considered and has made no determination upon the questions of fact arising upon the issues as to such ecclesiastical matters."

The amended decision is found in 279 App. Div. 1074, 1076, 111 N.Y.S. 2d 808 (1952).

The judgment as entered on June 3rd 1952 aside from formal parts reads:

> "ordered that the judgment so appealed from be reversed on the law and the facts, with costs; and plaintiffs' complaint and defendant's counterclaim dismissed, with costs to the defendant; and by said amended order having ordered that findings of fact expressed and implied inconsistent with its opinion and decision slips be reversed, *except such findings as were made expressly or by implication, upon questions of doctrine, polity and other ecclesiastical matters, which matters were not considered by said Appellate Division and as to which it has made no determination.*" * * * (Mich. Apx. 241a, 242a). (Emphasis supplied.)

The plaintiffs alone appealed to the Court of Appeals of New York. Its opinion is found in 306 N.Y. 115, 116

N.E. 2d 481 (1953). A judgment was entered in the Court of Appeals on the third day of December, 1953 in words and figures (aside from formal recitals) as follows:

> "And it was also further ordered, that the records aforesaid, and the proceedings in this Court be remitted to the said Supreme Court, there to be proceeded upon according to law.
>
> Therefore, it is considered that the said judgment be affirmed without costs, as aforesaid."

On the remittitur as provided in the Court of Appeals judgment above quoted, judgment was entered in the Supreme Court on January 25, 1954, as follows:

> "Adjudged that the order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this Court; and it is further
>
> Adjudged that the judgment entered herein on the 3rd day of June, 1952, be and the same hereby is affirmed" (Mich. Apx. 244a).

It is this judgment of the New York Courts (all three must be taken together) which expressly and explicitly states (in the italicized portion above quoted) that

> "questions of doctrine, polity and other ecclesiastical matters * * * were not considered * * * and as to which it has made no determination."

which counsel for petitioner now asserts was not accorded full faith and credit by the Michigan Supreme Court whereas in fact and in law the Michigan Supreme Court acted in complete recognition thereof and in accordance therewith.

The legal effect of the above quoted provision of said New York judgment cannot be other than that the Supreme Court judgment *against the merger* continues in full force as to matters of "doctrine, polity and other ecclesiastical matters."

The official report of the New York Court of Appeals states that the counsel for the defendant in *Cadman* (one of whom is counsel for petitioner herein) there contended—

> "III. Under the common law, and under the First and Fourteenth Amendments to the United States Constitution and under section 3 of article I of the New York Constitution, the court was without jurisdiction over these religious and ecclesiastical matters and without lawful power to make the judgment. (*Shelley v. Kraemer*, 334 U.S. 1; *Watson v. Jones*, 13 Wall. [U.S.] 679; *Everson v. Board of Education*, 330 U.S. 1; *Zorach v. Clauson*, 343 U.S. 306; *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94.)"

See 306 N.Y. at 157.

In this contention counsel was right for in the last case cited in the last above quotation—

> *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952)

which was again before the Court in 363 U.S. 190, no issue of property right was involved. The sole issue was as to the control of a religious corporation. The New York Legislature adopted an act which by its terms vested control of the corporation in a designated party. This was upheld by the New York Court of Appeals but was held invalid by the United States Supreme Court; the Court after referring to an earlier case said:

> "The opinion radiates, however, a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, *matters of church government as well as those of faith and doctrine. Freedom to select the clergy*, where no improper methods of choice are proven, we think, must now be said to have federal

> constitutional protection as a part of the free exercise of religion against state interference." (Emphasis supplied.)

First Congregational Church & Society of Burlington et al. v. Evangelical and Reformed Church, et al., 305 F. 2d 724 (CA 2d 1962) cert. den. 372 U.S. 918, is referred to on page 3 of petition. This was a second case attacking the merger. It was brought to the Federal Court by different plaintiffs non-residents of New York and sought to establish interest in the same property of the General Council, its boards and agencies. The Court of Appeals in that case said in relation to *Cadman:*

> "While it is not wholly clear from the Court of Appeals decision whether it upheld the Basis of Union on the merits or because the question of its invalidity was beyond the cognizance of the civil courts, it would make no difference to resolution of the issues presented here which of these grounds of decision was in fact adopted." Footnote p. 729.

And then in the opinion said:

> • • • "If they could show some right or interest adverse or dissimilar to that of the Cadman plaintiffs in these assets, etc., the present plaintiffs might prevail in their claim that the Cadman Church and Society could not adequately represent them in the litigation of such an issue." 729 Col. 2, lines 23-29.

Thus clearly indicating that in the opinion of that Court there was no *res judicata* of the ecclesiastical issue if different property interests were shown. Of the property interest of the plaintiffs in this Mayflower case there is no question.

The *ecclesiastical subject matter* of this Mayflower case also is substantially different from that before the Court in *Cadman*. In this Mayflower case the plaintiffs allege that the provisions of the constitution of the United Church of Christ, which was then proposed and is now a fact, were contrary to the tenets, doctrines, polity, government and other ecclesiastical characteristics of Congregationalism (Mich. Apx. 6a-9a). This constitution did not exist at the time of *Cadman*—the drafting had not been begun. The final draft of the constitution was distributed in July of 1960 for action by the local churches "by midnight June 1, 1961" and to take effect July 8, 1961. The New York Court had before it in *Cadman* the "Basis of Union" (with Interpretations) which stated that various provisions were to continue "until the adoption of the Constitution." The following are substantial matters in which there are material differences:

1. In respect of the *Ordination of Ministers,* the Basis of Union provides, VI. A, (Mich. Apx. 47a), "until a standard method is provided by the Constitution," ordinations shall be "in the same way, as before the union." In the Constitution, a standard method is provided and ordination is declared, (Const. Section 27, Mich. Apx. 141a)—"the *rite* whereby the *United Church*" confers "ministerial standing" on a person "God has called to the Christian ministry." The United Church acts "through an association in cooperation with the local church." This is a long way from "the same way as before the union." The historic way was for the local church to convene by invitation a council of other churches of the vicinage—such nearby churches as were known to be of similar view—which council carried through the function. The Association had nothing to do with ordination unless invited by the local church and then functioned as such a council and not as an association. Under Section 27 the local church can act only with

the cooperation of the Association. If it may be said that the Association cannot ordain alone neither can the local church without the Association as it could before. It must obtain the concurrence of its cooperator Association or nothing can be done and the ordination is made a rite of United Church and not of the local church.

This function of the local church "before the union" has been well described by *Leon Howard* (an Episcopalian) in *Literature and the American Tradition,* Doubleday 1960, p. 20, as follows:

> "A new way of church government, which freed each congregation from all external state or ecclesiastical control and guaranteed that freedom by allowing each to *call* and *ordain* its own ministers and officers and by giving each the absolute power to admit, release, admonish or excommunicate its own members." (Italics supplied.)

To say that this was passed on in *Cadman* is absurd when the Basis of Union expressly provided there would be a superseding standard method provided by the Constitution. To say that the new provision of the Constitution is not "an interference in or abridgment of Congregational usage and practice" is equally absurd.

2. As to the *Calling of Ministers,* the Basis of Union provides, VI C (Mich. Apx. 48a), "Ministers and churches desiring to maintain a system of pastoral placement in which the Conference or Association shall have little or no part shall be free to do so." The Constitution, Section 30, (Mich. Apx. 141a), states that the relationship between the minister and the local church "is also a concern of the Church at large as represented by an Association and a Conference." By Section 21 Constitution, line 12, (Mich. Apx. 140a), the local church may "call or dismiss its pastor or pastors by such procedure as it shall determine." Note

that this is limited to *procedure* and does not extend to the substantive *who may be called, where from and his qualifications.* The call is declared to be a "concern of the Church at large" (Const. Sec. 30, Mich. Apx. 141a). A minister of another denomination cannot be called unless the Association grants him Privilege of Call, and this is done only after examination by "The committees on the Ministry of the Conference and Association" (By-Law 132 at 161a). "Installation or recognition" upon acceptance of a call is a function of the Association (By-Law 128 Mich. Apx. 160a).

3. Amendments to the Constitution are by the Basis of Union stated to be "made by the General Synod and ratified by the Conferences in collaboration with the Associations and *Congregations.*" (Emphasis supplied.) (XG Mich. Apx. 67a.)

The section of the Constitution providing for amendment gives the "Congregation" (local church) no voice whatsoever in the making of amendments (Sec. 88 Mich. Apx. 153a). The power of amendment is vested in the General Synod and State Conferences. The local church has no voice in the matter. There is no limitation on the scope of the amendments which may be made. The local church has only the atlernative of accepting the amendment or withdrawal from United Church (Const. Art. IV, Sec. 21, last clause Mich. Apx. 140a). The vote of the majority of members voting of the local church is determinative on the issue of withdrawal. *The right of the minority under the principle quoted* from *Davis v. Scher,* 356 Mich. 291 (1959), ceases to exist when a local church goes into the United Church—by going in they agree to be bound by the majority.

Much is sought to be made (and was before the Michigan Supreme Court) of the statement in the last paragraph of the New York Court of Appeals opinion

> "the Basis of the Union is voluntary and in no way interferes with Congregational faith or manner of worship," (59a).

The Court had earlier in its opinion found that—

> No "action taken by the General Council leading to a consummation of the Basis of Union will in any way obligate the individual church to join in the Union except through its own voluntary action" (54a).

Thus the New York Court could well say—

> "no ecclesiastical question is presented" (54a).

Nor could such question be presented unless and until the majority of some local church voted to go into the Union and the minority were sufficiently concerned to go to court.

No local church was in any way bound by anything the General Council did and the local church was held not to have any interest recognizable in law in the General Council, its boards and agencies.

II.

DEPARTURE IS AN ECCLESIASTICAL QUESTION

On page 17 of the petition, petitioner argues that the departure issue is not an ecclesiastical question. This argument comes as a suprise because at all stages of the Michigan case it was understood that departure was an ecclesiastical question. When the defendant's motion to dismiss was first argued on September 20, 1961, the counsel for petitioner herein was asked the following question:

> The Court: Do you agree, Mr. Wood, that "departure" is a part of doctrine?
>
> Mr. Loren T. Wood: Yes. (Page 58 of the transcript of the argument before Judge Neuenfelt, Circuit Judge.)

The Appellate Division in *Cadman* treated the term "doctrine" as an ecclesiastical question because it said "questions of doctrine, polity and other ecclesiastical matters." See also the opinion from *Kedroff v. St. Nicholas Cathedral* found on page 8 hereof.

The term "departure" merely means a change in the doctrines, polity, tenets, government or organization of a church. It is apparent that all that the word "departure" means, as used herein, is a change of an ecclesiastical nature. Hence "departure" is an ecclesiastical question.

III.

THE MICHIGAN DECISION IS CLEARLY CORRECT

The Supreme Court of Michigan, as shown by its opinion, did carefully consider the two New York cases relied upon by petitioner and correctly determined that those cases did not bar the suit instituted by respondents here. If the Court of Appeals in *Cadman* intended to broaden the decision of the Appellate Division that jurisdiction should not be taken because of the lack of property interest in plaintiffs, the Court of Appeals would not have affirmed the judgment of the Appellate Division. That judgment said that no ecclesiastical questions were considered, and the Court of Appeals would not have affirmed that judgment without modification if it intended to decide any ecclesiastical questions.

IV.

THERE IS NO QUESTION OF FEDERAL LAW

The Michigan Supreme Court did accord full faith and credit to both *Cadman* and *Burlington*, and, therefore, no rights of petitioner under the full faith and credit clause were denied.

It is also suggested in the petition, page 12, that if the case is not reviewed now there will be "a long and burdensome trial" and that the *Cadman* case took twenty-three days. Counsel for respondents do not believe that counsel for petitioner can make the Michigan case last any such time. The case should be a relatively short one.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: January 6, 1967.